Editor's note: appealed -- stipulated dismissal, Civ.No. 82-93-BLG (D.Mont. Aug. 29, 1984)

NELLIE McLAUGHLIN
GENERAL ELECTRIC CO.

IBLA 82-104 Decided February 11, 1982

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring various mining claims abandoned and void. M MC 41093 through M MC 41152.

Affirmed.

1. Administrative Procedure: Decisions--Federal Land Policy and Management Act of 1976: Assessment Work-- Mining Claims: Assessment Work--Res Judicata

   While res judicata and collateral estoppel may be appropriately applied by the Board in its decisions, those doctrines need not be employed where the effect would be to impair the correctness and consistency of the Board's decisions and prevent the effectuation of statutory and regulatory policy. Where the Board has overruled part of an earlier Board decision that had reversed a BLM decision for invalidating appellants' mining claims upon an improper basis, res judicata will not protect appellants' claims from a subsequent BLM decision of invalidity grounded on a correct statement of appellants' violation of the recording laws.

APPEARANCES: James A. Poore III, Esq., Butte, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On June 16, 1981, this Board issued General Electric Co., 55 IBLA 185, which reversed a Montana State Office, Bureau of Land Management (BLM), decision that had declared various mining claims 1/

1/ General Electric owns mining claims M MC 41093 through M MC 41131 and leases M MC 41132 through M MC 41152 from Nellie McLaughlin. See this Board's first decision respecting these mining claims for more complete information about them.

abandoned and void for failure to file timely evidence of annual assessment work for the 1980 assessment year on or before December 30, 1980, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). The facts show that the appellants, Nellie McLaughlin and General Electric Company, had filed with BLM on October 5, 1979, their evidence of annual assessment work on the claims for assessment year 1980. The Board stated:

> Section 314 of FLPMA, 43 U.S.C. § 1744(a) (1976), requires the owner of an unpatented mining claim located prior to October 21, 1976, to file evidence of assessment work for the claim with BLM within the 3-year period following that date and prior to December 31 of each year thereafter. The corresponding Departmental regulation 43 CFR 3833.2-1(a) reads:
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> > (a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.
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> Failure to so file is considered conclusively to contitute abandonment of a claim under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976), and 43 CFR 3833.4.
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> An assessment year runs from noon September 1 of any given year through noon on September 1 of the following year. See 30 U.S.C. § 28 (1976). Thus, the assessment year preceding December 30, 1980, ran from noon on September 1, 1979, through noon September 1, 1980. Examination of the case files herein reveals that assessment work was done on appellants' claims after September 1, 1979, for assessment year 1980 and that evidence of that work was filed with BLM on October 5, 1979. There is nothing in FLPMA or the regulations which precludes a mining claimant from filing the required evidence for a particular assessment year as soon as the work is accomplished. We find that appellants have complied with the requirements of FLPMA for 1980.

55 IBLA at 186.

On July 30, 1981, this Board issued a decision overruling in part our earlier decision in General Electric Co., supra. In James V. Joyce (On Reconsideration), 56 IBLA 327 (1981), we stated:

> We are aware that our recent decision in General Electric Co., 55 IBLA 185 (1981), may be the source of some confusion. That decision should have been predicated on the narrow ground that the State Office had erred in stating

> that no filings had been made for the 1980 assessment year. While this fact was mentioned, the decision went on to say that filing in October 1979 would constitute compliance with the filing requirements for the 1980 calendar year. That statement is wrong. Thus, to the extent that General Electric Co., supra, contemplates such a result, it is hereby expressly overruled.

56 IBLA at 330.

Upon that authority, on October 8, 1981, BLM issued a new decision affecting the mining claims and appellants involved in the earlier General Electric Co. case. The new decision stated in part that "the owner of a mining claim located prior to October 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment * * * work on the claim prior to December 31 of each year following the calendar year of recordation." Thereupon the mining claims were declared abandoned and void for failure to make proper filings "within the calendar year 1980, i.e., on or after January 1 and on or before December 30." McLaughlin and General Electric appeal.

Appellants make several arguments on appeal; however, because we reaffirm our opinion in James V. Joyce (On Reconsideration), supra, we need to address only those arguments relating to the doctrines of res judicata and collateral estoppel. Appellants contend that since BLM did not seek reconsideration of our earlier decision in General Electric Co., supra, which involved similar issues about these same claims, that earlier decision was final according to 43 CFR 4.21(c). 2/ Therefore, it is argued, BLM is prohibited from again using the 1980 assessment year as a basis for invalidating the appellants' claims because the doctrines of res judicata and collateral estoppel prevent the Department from reaching a conclusion contrary to the one reached by the Board in its earlier decision. They cite Sunshine Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940), where the Supreme Court stated:

> A judgment is res judicata in a second action upon the same claim between the same parties or those in privity

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2/ 43 CFR 4.21(c) states:

"Finality of decision. No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned, and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies."

We would note that, at present, there is no time period for filing a petition for reconsideration.

> with them. Cromwell v. County of Sac, 94 U.S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government. [Emphasis in original.]

The Court then discussed whether the National Bituminous Coal Commission had the authority to act for the United States. It concluded:

> There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials.

Id. at 403.

Appellants also note that the Supreme Court has found the doctrine of res judicata to be appropriate "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate * * *." United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966). Other courts have applied collateral estoppel to prevent relitigation of the same issues before an administrative agency. 3/ Appellants also argue that since General Electric Co., supra, was final before the issuance of James V. Joyce (On Reconsideration), the overruling of the former does not impair the rights appellants established under that earlier decision, and that a contrary holding by the Board now would compromise the integrity of the Department's appellate process. We disagree.

[1] It is true that the doctrines of collateral estoppel and res judicata may apply to the appellate workings of administrative agencies. This Board's earlier decisions have shown that understanding. See, e.g., Donald W. Coyer, 50 IBLA 306 (1980); United States v. Richard G. Clemans, 45 IBLA 64 (1980). However, we do not believe that the opinions cited by appellants require the application of res judicata by an administrative agency where such application would impair the correctness and consistency of the agency's decisions and prevent the effectuation of statutory and regulatory policy. Nothing in the cited opinions disallows the Department to take new action against appellants in order to effect the result required by FLPMA.

As one scholar has stated:

> The desire for repose on which res judicata rests relates primarily to findings of fact; repose on lively

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3/ Goldstein v. Doft, 236 F. Supp. 730 (1964), aff'd, 353 F.2d 484 (1965), cert. denied, 384 U.S. 960 (1966).

> problems of law may even be affirmatively objectionable. A tribunal ought not to be barred from using trial-and-error methods of feeling its way into an undeveloped frontier of law and policy. Even when the principle of res judicata should be rigidly applied to findings of fact, some relaxation of its application to rulings of law may be indicated.
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> The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that that principle should not be at all applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules concerning res judicata.

2 Davis, Administrative Law Treatise, 566, 568 (1958).

As we said in United States v. Richard G. Clemans, supra at 69, "Unless and until a patent issues, title to the claims in controversy remains in the United States, and it may inquire into the extent and validity of rights claimed against it. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 430 (1920); Ideal Basic Industries, Inc. [v. Morton, 542 F.2d 1364 (9th Cir. 1976)]." In General Electric Co., 55 IBLA 185 (1981), we reversed the earlier BLM decision because its rationale was the following: "It was necessary that evidence of annual assessment work for the assessment year ending at noon, September 1, 1980, be filed in this office no later than December 30, 1980." Appellants had in fact acted in accordance with that statement when they filed with BLM on October 5, 1979, their evidence of the assessment work performed for the assessment year 1980. However, appellants had thereby not complied with the requirements of FLPMA and its attendant regulations, under which appellants must have filed either evidence of assessment work performed for the preceding assessment year or a notice of intention to hold the mining claims in each of the calendar years 1979 and 1980. Since this was not done, the unavoidable conclusive presumption of abandonment attaches, which the Department of the Interior is impotent to stay. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

"The conclusive effect of an administrative determination is limited to the purpose for which it was made." Connecticut Light & Power Co. v. Federal Power Commission, 557 F.2d 349, 353 (2nd Cir. 1977). Our holding in General Electric Co. was narrowly limited to reverse BLM's incorrect basis for taking action against the appellants. Although we stated in dictum that "appellants have complied with the requirements of FLPMA for 1980," that particular language was repudiated in James V. Joyce (On Reconsideration). BLM's October 8, 1981, decision is grounded on a correct statement of the appellants' failure to meet the requirements of the recordation law, and since each appeal has thus involved the resolution of different issues of law, res judicata does not apply. Connecticut Light & Power Co., supra. This is simply a case in which "that principle should not be at all applicable." 2 Davis,

Administrative Law Treatise, 568 (1958). Similarly, the facts of the case are undisputed and identical in each appeal, and invoke the statutory conclusive presumption of abandonment. Therefore, no application of collateral estoppel would require, or even suggest, the result hoped for by appellants.

We also note that the dictum in General Electric Co. did not constitute the law of the case. However, even if it were assumed arguendo that the statement respecting appellants' compliance with FLPMA were something more than dictum, the doctrine of law of the case is one of policy only and may be disregarded when compelling circumstances call for a redetermination of a point of law determined on prior appeal. Ryan v. Mike-Ron Corp., 63 Cal. Rptr. 601, 605 (Cal. App. 1967). It is merely a rule of procedure and does not derogate the inherent power of the Board to reach the correct result. "The law of the case doctrine does not preclude * * * clarifying or correcting an earlier, ambiguous ruling." Swietlowich v. County of Bucks, 610 F.2d 1157, 1164 (3rd Cir. 1979), citing Messenger v. Anderson, 225 U.S. 436 (1912). We have decided this appeal consistently with other cases that have involved the rule explained in James V. Joyce (On Reconsideration); see, e.g., N. L. Baroid Petroleum Services, 60 IBLA 90 (1981); and appellants have not been deprived of any rights authorized by law. See Lynn Keith, supra at 198.

In any event, appellants herein are seeking to have their October 5, 1979, filing of evidence of assessment work do double duty. First, they contend that it complies with the requirement that, for claims located prior to October 21, 1976, a copy of evidence of assessment work be filed no later than October 22, 1979. Second, they argue that this somehow simultaneously fulfills the requirement that they file a proof of labor "prior to December 31 of each year thereafter." (Emphasis added.) Appellants cannot have it both ways. Inasmuch as the "thereafter" refers to the initial filing of the evidence of assessment work (see Harvey A. Clifton, 60 IBLA 29 (1981)), it is difficult to comprehend how one filing can be made "thereafter" itself.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge